NO. 81-761

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

ERNEST DONALD SUGGS,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF
CRIMINAL APPEALS OF ALABAMA

BRIEF OF RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Whether the question of petitioner's being denied due process to the trial court's oral charge on self-defense is within the jurisdiction of the Supreme Court where this issue was not properly presented to the highest court of the State and was not reviewed.

II. Whether in Alabama is the burden of proof ever upon a defendant to prove self-defense and did the trial court's oral charge create such an impression.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama is published at 403 So. 2d 303 (1981). The Alabama Supreme Court denied the petition for certiorari without opinion at 403 So. 2d 309 (1981).

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. §1257. It is respondent's position that this Court is without jurisdiction to consider the issue presented since this issue was never properly presented to the highest court of the State and was not expressly passed on by the Alabama Supreme Court.

STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> "SECTION I. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws."

28 U.S.C. §1257 states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari...where any title, right, privilege or immunity is

specially set up or claimed under the Constitution...."

Rule 39(k), Alabama Rules of Appellate Procedure, states:

> "(k) Scope of review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to the request, petitioner may copy the statement in the petition to this court, with references therein to the pertinent portions of the clerk's record and reporter's transcript, and it will be considered along with the statement of facts in the opinion of the appellate court, if found to be correct."

STATEMENT OF THE CASE

Petitioner, Ernest Donald Suggs, was indicted for assault with intent to murder by the grand jury of Calhoun County, Alabama. He pleaded not guilty. His trial began on June 11, 1979, in the Seventh Judicial Circuit of Alabama. On June 13, 1979, he was found guilty and sentenced to 14 years imprisonment. He gave notice of appeal and filed a motion for new trial, which

was denied on August 6, 1979. On May 5, 1981, the Alabama Court of Criminal Appeals affirmed his conviction. The opinion of the Alabama Court of Criminal Appeals did not address any issue regarding the trial court's oral charge. Petitioner filed a motion for rehearing which was denied on June 23, 1981. He then filed a petition for a writ of certiorari in the Supreme Court of Alabama on July 7, 1981. The Petitioner in his petition for writ of certiorari did not assert that he used Rule 39(k), Alabama Rules of Appellate Procedure, to bring the trial court's oral charge to the Court of Criminal Appeals' attention on rehearing.

REASONS FOR DENIAL OF THE WRIT

1. THE SUPREME COURT HAS NO JURISDICTION TO REVIEW ISSUE OF THE TRIAL COURT'S ORAL CHARGE WHICH WAS NOT PROPERLY PRESENTED AND REVIEWED BY THE STATE'S HIGHEST COURT.

On May 5, 1981, the Alabama Court of Criminal Appeals affirmed the Petitioner's conviction without addressing the issue of whether the trial court's oral charge on self-defense was incorrect.

Then, on July 7, 1981, when the Petitioner filed his petition for writ of certiorari before the Alabama Supreme Court he neglected to state that he had used Rule 39(k), Alabama Rules of Appellate Procedure, to bring the trial court's oral charge to the Court of Criminal Appeals' attention on rehearing.

Since review of the Supreme Court of Alabama is limited to the facts stated in the opinion of the Court of Criminal Appeals unless on rehearing a Rule 39(k) motion is used to present an additional or corrected statement of facts, the Alabama Supreme Court did not have the power to address this issue. Rule 39(k), Alabama Rules of Appellate Procedure.

In Street v. New York, 394 U.S. 576 (1969), it was held that if a question is not presented to the State courts in such a manner that it is decided by the highest court of the State when it affirms the conviction, then the Supreme Court has no power to consider the matter.

In Michigan v. Tyler, 436 U.S. 499 (1978), the Supreme Court held that the failure of a litigant to follow proper procedure resulting in the refusal

of a State Court to consider a question, constitutes adequate grounds for barring review in the U. S. Supreme Court so long as the State has a legitimate interest in enforcing its procedural rule.

Therefore, since the Alabama Supreme Court could not review the trial court's oral charge, there is no jurisdiction for this Court to review this issue either.

2. IN ALABAMA THE BURDEN OF PROOF IS NEVER UPON A DEFENDANT TO PROVE SELF-DEFENSE AND THE TRIAL COURT'S ORAL CHARGE DID NOT CREATE THIS IMPRESSION.

In Alabama the burden is never upon the defendent to prove self-defense. In any homicide case in which there is evidence of self-defense, the burden is upon the State to satisfy the jury by the evidence beyond a reasonable doubt that the defendant is guilty, and this burden is not shifted from the State to defendant by reason of applicability to the particular case of the defense of self-defense or defense of another. Howard v. State, 390 So. 2d 1070, 1072 (Ala. Cr. App.), writ denied 390 So. 2d 1077 (Ala. 1980).

Moreover, as stated in the trial court's oral charge, the defendant has only the duty to show some evidence of self-defense and he need not even offer any evidence of self defense at all if the evidence offered by the State showing assault with intent to murder also supplies such evidence. (Petitioner's Appendix page 14).

Therefore, the present case is unlike Hollo-way v. McElroy, 632 F. 2d 605 (5th Cir. 1980), wherein a Georgia State Court had instructed the jury that the presumption of innocence was removed and burden of proving self-defense was on the slayer once an intentional homicide had been proven. 632 F. 2d at 619.

In any case it should be noted that at the end of the trial court's oral charge before the jury retired the Petitioner's attorneys made it clear that the defendant was not raising the issue of self-defense but was claiming that what occurred was an accident. (R-376-378).

CONCLUSION

Based on the foregoing, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Charles A. Graddick
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ATTORNEY GENERAL OF ALABAMA

Elizabeth Ann Evans
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ASSISTANT ATTORNEY GENERAL
OF ALABAMA

CERTIFICATE OF SERVICE

I, Elizabeth Ann Evans, an Assistant Attorney General of Alabama and a member of the Bar of the Supreme Court of the United States, do hereby certify that-on this 8th day of January, 1982, I did serve three copies of the foregoing on the Attorney for Ernest Donald Suggs, Petitioner, by mailing same to him, first class postage prepaid and addressed as follows:

Hon. Joe R. Whatley, Jr.
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